

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

Criminal (Bail)Application No. 1034 OF 2007

in

Criminal Appeal No. 566 of 2007

Alister Anthony Pereira)
aged 21 years, residing at)
Silvaraj, 43 , St. Paul Road,)
Bandra, Mumbai.)..Applicant

versus

The State of Maharashtra)
through Khar Police Station)..Respondent.

Mrs. Manjula Rao for the applicant

Mr. Ravi Kadam, Advocate General, with Mr. S.R. Borulkar, Public
Prosecutor, for the State.

CORAM: SWATANTER KUMAR, C.J. &
SMT. RANJANA DESAI, J.

Dated : September 7, 2007

JUDGMENT (Per Swatanter Kumar, C.J.):

I. In this bail application filed on 7th September 2007, arguments on the maintainability of the bail application were addressed by the learned counsel for the respective parties. Hardly any arguments were addressed on the merits of the case and due to shortage of time the court had passed the following order:

“We have heard the learned counsel appearing for the parties on the question of grant of bail and suspension of sentence on the strength and the basis of section 389(3) of the Criminal Procedure Code.

2. Argument raised before us on behalf of the State is that the applicant has no right of appeal with the exception alone of Article 136 of the Constitution of India as such this provision will have no application. Same arguments have been advanced by the learned counsel appearing for the accused. Reliance is also placed on the judgment of the Supreme Court in Mayuram Subramanian Srinivasan vs CBI (2006) 5 Supreme Court Cases 752) and the judgment of the Kerala High Court in K.M. Salim vs State of Kerala, (1986 Criminal Law Journal 1197). Learned counsel for the accused has contended that on the cumulative reading of provisions of sections 372, 374, 389(3) and 393 of the Criminal Procedure Code, the judgment of this court is not final as he has been convicted under section 304 Part II of the Indian Penal Code for the first time by this court and as such the accused will be entitled to the benefit of appeal. We will deal with this argument by a detailed order.

3. For the reasons to be stated later, however, bail application of the accused is rejected.”

2. In view of the above now we proceed to record the reasonings for declining bail primarily on the ground that the application

for bail was not maintainable in law.

3. The learned Advocate General appearing for the State had relied upon sections 372, 374 and 389 of Cri. P.C., to argue that the provisions of section 389 would be attracted and would give a right to a person to pray for suspension of sentence and grant of bail only if the person has a right of appeal within the provisions of Cr.P.C. Section 389(3) reads as under:

“389- Suspension of sentence pending the appeal: release of appellant on bail:-

X X X X X

3)where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall-

- i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or
- ii) where the offence of which such person has been convicted is a bailable one, and he is .on bail;

order that the convicted person be released on bail unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section(1), and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

X X X X X X X X X ”

4. Under section 374(1) any person convicted on a trial held by a High Court in its extra ordinary original criminal jurisdiction may appeal to the Supreme Court. Section 372 provides a bar that no appeal shall lie from any judgment or order of a Criminal Court except as provided for by the Code or by any other law for the time being in force. Section 389(3) provides that where the convicted person satisfies the court by which he is convicted that he intends to present an appeal and subject to the satisfaction of the conditions where the sentence awarded to him is for imprisonment for a term not exceeding 3 years, the Court would suspend the sentence and release the accused on bail. The right to appeal as contemplated under section 389(3) of the Code is stated to be a statutory right and not any other right. The provisions of section 372 do support this argument that the right of an appeal should be controlled and provided for by provisions of the Code and then alone the provisions of section 389(3) comes into operation. We have no doubt in our mind that the expression "Court" appearing in section 393 shall include Appeal Court more so when an appeal is against the order of acquittal. In such a case the appeal court would in fact convict the accused, if found guilty at the first instance. In the case of Mayuram Subramanian Srinivasan vs CBI, (2006) 5 SCC 752, the Court held as under:

“Section 389(3) has application when there is a right of appeal. Where prayer for grant of certificate of the High Court to appeal in this Court in terms of Article 136 of the Constitution of India, 1950(in short “Constitution”) or is made under Article 134-A of the Constitution there is no the right of appeal involved. In such cases section 389(3) has no application. Merely because somebody intends to file application under Article 136 of the Constitution and seeks leave to appeal under Article 136 of the Constitution. Section 189(3) of the Code has no application.....”

A reference can also be made to a Division Bench decision of the Kerala High Court in the case of K.M. Salim vs State of Kerala, 1986 Cri L J 1197 where the court held as under:

“5. S.389 of the Code enables the suspension of sentence pending appeal and the release of the accused on bail. The appellate court can for reasons to be recorded in writing, order that the execution of the sentence is suspended and if he is in confinement he be released on bail. If the appeal lies to a subordinate court, the High Court may even then, exercise this power. When the convicted person satisfies the trial court that he intends to present an appeal, the trial court is empowered in certain specific cases to release the convicted person on bail and to suspend the sentence. S 389 therefore postulates a right of appeal to the convicted person and the power of the appellate court to suspend sentence arises and that of the trial court ceased when the appeal is filed. When the High Court, in appeal, confirms the sentence, there is no further appeal to the Supreme Court except as specifically provided in Art 134 of the Constitution. When there is no appeal as of right, S 389 has no application.

6. It is only Art 134 of the Constitution that provides for appeal as of right in criminal matters to the Supreme Court. In those cases, postponement of execution of sentence by the High Court is provided for in S. 415 of the Code. S 415(3) also

provides the circumstance under which the execution of sentence can be suspended where a person “intends to present a petition to the Supreme Court” under Art 136 of the Constitution. That power can be exercised only when a sentence of death is passed or confirmed and the High court is satisfied that the person sentenced intends to move the Supreme Court. No such provision is made in S 389. It is, therefore, clear that S 389 cannot apply to any case where the person concerned only intends to file an application for special leave under Art 136”.

5. The learned counsel for the accused relied upon the decision of the Division Bench of Karnataka High Court in the case of B Subbaiah vs The State of Karnataka, 1992 Cri L J 3740 to contend that the provisions of section 389(3) would be attracted if the accused wants to prefer an appeal to the appeal court. Reliance placed on the decision of the Karnataka High Court can hardly further the case of the accused, in as much as on principle the Court also clearly held that the right to file an appeal has to be a statutory right. Appeal under section 136 of the Constitution of India confers no right of appeal and the accused cannot invoke the provisions of section 389 (3) for suspension of sentence for filing the appeal. This was a decision of the Division Bench of the High Court on the question of law. In the said case the accused was seeking interim bail for six weeks.

6. Where the legislative intent is to place a restriction on exercise of power by the Court either by explicit language or by necessary implication, then the law of interpretation would require the Court to carry that object. The view taken by the Supreme Court as well as different High Courts is that the provisions of Section 389 (3) of the Cr.P.C. would be attracted only where a right of appeal as contemplated under Section 372 of the Code is available. No doubt, in the present case, the appeals were preferred by the State after obtaining leave under Sections 377 and 378 of the Code. The accused was convicted for an offence under Section 304A while he was acquitted for an offence under Section 304 Part-II of the IPC and this Court found him guilty of an offence under Section 304 Part-II and punished him accordingly. But that would not per se give a right of statutory appeal to the accused and thus entitle him to the benefit prescribed under Section 389 (3) of the Cr.P.C. We have intentionally not discussed the merits of the case. The accused was, as a matter of fact, on bail during the trial and even during the pendency of the appeals. The appeal to the Supreme Court is permissible only under Section 374 (1) of the Cr.P.C. and in all other matters the accused has to file appeals under Article 136 of the Constitution of India.

7. For the above reasons, the application is not maintainable and consequently the same is rejected.

CHIEF JUSTICE

SMT. RANJANA DESAI, J.